U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, D.C. 20001-8002

Date: June 12, 1998

Case No.: 97 INA 332

In the Matter of

THRIFTY PAYLESS, INC.,
Employer

in behalf of

MEETA RATISH DESAI,
Alien

Appearance: R. W. McMillan, Esq., of Pasadena, California.

Before : Huddleston, Lawson, and Neusner
Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

DECISION AND ORDER

This case arose from a labor certification application that was filed on behalf of MEETA RATISH DESAI ("Alien") by THRIFTY PAYLESS, INC., (Employer") under § 212 (a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a) (5)(A) ("the Act"), and regulations promulgated thereunder at 20 CFR Part 656. After the Certifying Officer ("CO") of the U.S. Department of Labor at San Francisco, California, denied the application, the Employer appealed pursuant to 20 CFR § 656.26.[1]

Statutory Authority. Under § 212(a)(5) of the Act, an alien seeking to enter the United States to perform either skilled or unskilled labor may receive a visa, if the Secretary of Labor has decided and has certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified, and available at the time of the application and at the place where the alien is to perform such labor; and (2) the employment of the alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed at

[1]The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c).

that time and place. Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. The requirements include the responsibility of an Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means to make a good faith test of U.S. worker availability.

STATEMENT OF THE CASE

On February 21, 1995, the Employer applied for alien labor certification on behalf of the Alien to fill the position of "Pharmacist" in the Employer's firm, which was a Retail Drug Store Chain."AF 57.[2] The position was classified as a "Pharmacist," under DOT Occupational Code No. 074.161-010.[3] The Employer described the job duties as follows:

> Pharmacy Manager: Train and supervise pharmacy personnel including staff pharmacist, technicians, pharmacist clerk and interns. Prepare schedules and budget wages. Maintain inventory. Maintain narcotic and scheduled drug record keeping. Perform light bookkeeping and first level employee relations.
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> Pharmacist: Compound, label & prepare medications as directed by prescriptions. Dispense narcotic & hypnotic drugs in compliance with state and federal laws. Maintain records on drug dispensing for prescriptions. Provide customer consultation and information on drug products and other health care related matters.

AF 57 at Item 13. The minimum education for a worker to perform satisfactorily the job duties described in Item 13 of ETA Form 750A was a baccalaureate degree in Pharmacy plus six months of training as an Intern Pharmacist. In addition, the Employer required one year of experience in the Job Offered or two years in the Related Occupation of Staff Pharmacist. *Id.*, at item 14. The Other Special Requirements were that the worker be licensed by the California Board of

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[2]The Alien, a national of India, represented in Form ETA 750 B that she earned a baccalaureate degree in pharmacy in India September 1990. From December 1991 to August 1992 the Alien worked as an Intern Pharmacist in the Employer's San Bernardino Retail Drug Store, where she remained from August 1992 to August 1994 after the Employer promoted her to Staff Pharmacist. In August 1994 the Employer again promoted the Alien to Pharmacist/Manager and moved her to its store at Wilsonville, Oregon, where she continued working for the Employer on the date it filed this application. AF 114, 115. The Alien claims no other relevant education, training, or experience. On the basis of the experience and training that the Alien acquired between December 1991 and the date of this application, she is qualified for the position described in item 13 of Form ETA 750A. AF 118.

[3]Administrative notice is taken of the Dictionary of Occupational Titles, ("DOT") published by the Employment and Training Administration of the U. S. Department of Labor.

Pharmacy and be able to operate a pharmacy computer. *Id*., item 15.[4]
Two U. S. job applicants responded after this position was advertised and posted, but the Employer rejected them. AF 56, and see AF 67-83.

Notice of Findings. Subject to the Employer's rebuttal under 20 CFR § 656.25(c), the CO denied certification in the Notice of Findings ("NOF") dated September 4, 1996. AF 49-55. The CO found that the Employer failed to document the restrictive requirements, the unusual work schedule, the rejection of U. S. workers, and the specificity of its recruiting advertisements.

(1) Citing 20 CFR §§ 656.21(b)(2)(i)(A) and 656.21(b)(5), the CO said the Employer had failed to offer sufficient evidence to justify restrictive job requirements that would preclude the referral of otherwise qualified U. S. workers. The restrictive requirements were (1) the minimum job requirements Employer stated in item 14 of Form ETA 750A, and (2) requirement that the job candidate be able to operate a pharmacy computer. While the hiring criteria, themselves, would be acceptable, the Alien's acquired the necessary qualifications to be hired under these job requirements while working for the Employer. The CO said the wages, terms, and other conditions of employment that the Employer had provided to the Alien must be offered to U. S. workers seeking the position described in this application. The CO concluded that,

> The minimum requirements must be reduced to zero and operation of a pharmacy computer deleted since the alien beneficiary did not have any of the qualifying internship and experience prior to employment with Thrifty Payless Inc., and was provided the training and opportunity to gain the experience required.

(2) Citing 20 CFR §§ 656.20(c)(7) and 656.20(c)(8), the CO said the position that is offered must not conflict with any laws, and it must be a *bona fide* job with an employer /employee relationship that is clearly open to U. S. workers. The working conditions that the Employer offered for this job stated a chaotic pattern of hours and shifts, with no indication of either overtime or time off during the seven day week. The Employer, on the other hand, indicated that the worker has the authority to establish her own work schedule for any time during a seven day week. This gave the appearance that the worker would be self-employed and suggested that the existence of an employer/employer relationship under 20 CFR §§ 656.3 was not proven.

(3) The CO cited 20 CFR § 656.24(b)(2)(ii) in finding that the Employer had rejected a qualified U. S. worker who, by education, training, experience or by a combination of these qualifications was able to perform in the normally accepted manner the duties of this position as it

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[4]The work hours varied within a forty-four hour week at $35.40 per hour, with no overtime. Employer explained that, "Since employee is considered management, she receives salary for an average of forty four hours per week. No overtime is paid." The work schedule varied from week to week between the day shift from 9:00 a.m. to 6:00 p.m., and the evening shift, 12:00 p.m. to 9:00 p.m.AF 60.

customarily is performed by other U. S. workers similarly employed. The Employer had rejected Mr. Sayed because he was under a contract with a temporary placement agency for pharmacists. As this hiring criterion was not stated in Employer's Form ETA 750A, it could support the rejection of this job applicant, said the CO, who found the employer's other reasons for rejecting this candidate to be unpersuasive. The CO concluded that Employer's conduct of the hiring effort and its refusal to hire this well qualified job applicant showed a lack of good faith compliance with the Act and regulations.

(4) Under 20 CFR § 656.21(g) the CO said the Employer's recruitment advertisement failed to describe the job with particularity or to provide an accurate statement of its minimum job requirements or proposed rate of pay. The CO added that the Employer failed to provide the location of the job offered, but merely stated the address where the interviews would take place. As the Employer operated from multiple store locations, this information was misleading and failed to satisfy the regulatory requirements.

Rebuttal. The Employer's October 9, 1996, rebuttal addressed the issues stated in the NOF. AF 12-47. Employer argued that its experience requirement was correct because it was consistent with the standard of the DOT for the position at issue, placing great emphasis on its contention that the Alien had been promoted to Pharmacy Manager from her "lesser position" as a Staff Pharmacist. AF 14. The Employer relied on the dissimilarity between the work of a Pharmacy Manager and the duties of a Staff Pharmacist, citing **Conde, Inc.**, 87 INA 598 (Dec. 11, 1987), **Chilcote, Inc.**, 90 INA 099 (Feb. 28, 1991), and **Carrillo's Mexican Restaurant,** 90 Ina 098 (Feb. 28, 1991). Conceding that both a Pharmacy Manager and a Staff Pharmacist perform pharmacy duties, the Employer argued that the Pharmacy Manager "performs a higher level of duties and has many more and greater responsibilities." Examples of such added responsibilities included supervision of the Staff Pharmacist *inter alia*, training pharmacy personnel, preparing budgets, maintaining narcotic and scheduled drug records, and drawing up the work schedules for the store workforce.[5]

In discussing the erratic work schedule mentioned in the NOF, the Employer argued that "the job of pharmacy manager is a salaried managerial position and the hours required are not contrary to federal, state or local law." [6] While conceding that this worker was responsible for setting her own the work schedule and the work schedules of all of the employees, Employer asserted that its policy required the Pharmacy Manager to schedule her own shifts at varying times in order to observe and supervise all personnel, contending that its policy was "not unusual for the industry." AF 14-16.

The Employer argued that Mr. Sayed was rejected for reasons that were lawful and job

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[5]The Employer cited cases relating to various promoted positions in **Deloitte & Touche**, 90 INA 493 (Feb. 2, 1992), **Paradise Produce, Inc.**, 90 INA 463 (Apr. 30, 1992), and **Altera Corporation**, 90 INA 136 (Jun. 19, 1992).

[6]The Employer did not offer evidence or citations of law to support this contention.

related. First, it said, he was not available to hire as he was under contract with a temporary employment agency. Noting the existence of a "long standing business relationship that is extremely important and necessary to Thrifty in filling their need for temporary contract pharmacist[s], Employer implied that hiring this job applicant would "violate ... and jeopardize this business relationship," adding that hiring this worker would "cause Thrifty to be unable to fill their temporary employment need in the future." Second, Employer said it assumed that this worker was untruthful and speculated about the circumstances under which he had left his previous employment with another chain pharmacy and the hazards it would confront in hiring him.[7]

Finally, the Employer responded to the defects in its advertisement by noting that it was "very specific as to the locations [of the] job interview, as the CO had observed, contending that it did state that the job was located in San Bernardino. AF 17. This assertion in the Employer's rebuttal was false and could not be accepted by the CO because the recruiting advertisements in this record did not, in fact, mention the job location. AF 87-89.

Final Determination. The CO denied certification in the Final Determination issued on November 12, 1996. AF 08-10. The CO said that the Employer did not sustain its burden of proof, as it failed to document that its existing requirements were normal for this position, or to prove the business necessity of the restrictive requirements under 20 CFR § 656.21(b)(2) (i)(A). The CO further found that the Employer failed to address the issue as to the training in the use of the pharmacy computer, which was deemed admitted. The CO also discussed the Employer's response to the NOF findings that it had rejected qualified U. S. workers who had applied for the job. The Employer's rejection of the U. S. worker on grounds that his integrity was questionable was rejected as unsubstantiated by credible evidence. The CO dismissed the Employer's argument based on the terms of the alleged contract with a temporary employment agency to be insufficient to support the finding that it had rejected the U. S. worker for reasons that were lawful or job-related.[8] Finally, because the Employer's recruiting advertisement failed to state the location of the job, the CO concluded that Employer had failed to include correct information in the advertisement and misled U. S. applicants for the position offered.[9]

Appeal. Following the denial of certification, on December 11, 1996, the Employer

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[7]The Employer assumed that the applicant was a highly valued current employee of the temporary employment agency while simultaneously deciding that he was also an untruthful discarded employee of another chain drug operator which alleged it had fired him under undisclosed circumstances that Employer assumed were so "sinister" as to disqualify him for this job.

[8]The good faith of this argument is suspect, as the existence of such a contract was known to the Employer at the time the position was advertised and its disclosure at the time the Employer rejected the U. S. worker seeking this job was reluctant and late. Most charitably, it could be regarded as a criterion for hiring whose omission from the job requirements was ill advised but not accidental.

[9]The problems relating to the job location that the Employer's interviewer discussed were directly traceable to this omission, and used the job applicant's response to her disclosure of the job location at the interview as a further reason for judging him unworthy of hiring for this position.

requested review of the Final Determination, and it submitted written arguments repeating the positions it had stated in the rebuttal.

Discussion

The issues underlying the Employer's rebuttal and appeal arose from its admission that the Alien gained the requisite job experience while working for the Employer. Even assuming that the Employer gave the Alien training for the position and rejected U. S. candidates as unqualified for this job without offering them equivalent training, the Employer contends that its rejection of U. S. candidates did not violate 20 CFR § 656.21(b)(6) because Alien's prior job duties were sufficiently dissimilar from the job offered, citing the holding in **Delitizer Corp., of Newton**, 88 INA 482 (May 9, 1990) *inter alia*.

Noting that the employer must sustain the burden of proving the dissimilarity between the position at issue and the jobs where the alien had acquired the level of experience required, the Board commented in **Delitizer** that, "While the standard itself is straight forward, ambiguities may exist concerning the application of the standard." In **Delitzer** the Board expressly rejected the argument that analysis of similarity should be limited to a comparison of the job duties, observing that, "Two jobs may have separate identities (and DOT codes), but still be considered sufficiently similar under section 656.21(b)(6)." "Thus," the Board continued, "while a comparison of the job duties is certainly a relevant consideration, we are not persuaded that this should be the sole consideration."[10] After a detailed discussion of its reasons, the Board said,

> Recognizing that a consideration of these various factors will offer Certifying Officers broad discretion in determining the similarity or dissimilarity of positions, we hold that Certifying Officers, in making such determinations must clearly state those factors [that were] included as a basis for their decisions. It must be remembered, however, the employer bears the ultimate burden of proof to demonstrate that the positions are dissimilar.

The Board then reaffirmed the principle that where the required experience was gained by an alien while working for the employer in jobs other than the job offered, an employer must demonstrate that the job in which the alien gained experience was not similar to the job offered for certification. The Board observed that,

> Some relevant considerations on the issue of similarity include the relative job duties and supervisory responsibilities, job requirements, the positions of the jobs in the employer's job hierarchy, whether and by whom the position has been filled previously, whether the position is newly created, the prior employment practices of the Employer regarding the

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[10] Analyzing recent panel decisions, the Board noted that the positions were found dissimilar in **Eimco Process Equipment Co.**, 88 INA 216 (Aug. 4, 1989), where the employer demonstrated a long history of recruiting and hiring using the same minimum qualifications it now required.

relative positions, the amount or percentage of time spent performing each job duty in each job, and the job salaries.[11]

The Employer's brief indicates that it was aware of the **Delitizer** criteria, and it contended that the Staff Pharmacist and the Pharmacy Manager are dissimilar positions. But for the random and unsupported assertions in its brief, however, the Employer's evidence as to the elements of proof BALCA required in this precedent was incomplete and unpersuasive. The Employer relied primarily on its arguments relating to the positions of the two jobs in its hierarchy, and the relative job duties and supervisory responsibilities.[12] The Employer failed, however, to offer persuasive evidence as to its prior employment practices regarding the relative positions, whether and by whom this position had previously been filled, the amount or percentage of time spent performing each job duty in each job, and the job salaries. Moreover, it contended that the job of Pharmacy Manager was a "promotional position."

It is relevant to the application of 20 CFR § 656.21(b)(6), that the Employer admitted and relied on the contention that the Alien reached this position by being promoted. AF 37. The Alien's application and qualifications fully supported this disclosure by the Employer, lending persuasive weight to the inference that the Employer's workers routinely progressed from an entry level job as an intern or, at best, from an intermediate job as Staff Pharmacist in the course of rising to the level of Pharmacist /Manager. As the Employer has represented that the Alien acquired the necessary skills while working in other jobs in its organization, the evidence of record strongly indicates that the managerial level job offered in Form ETA 750 A is a position that an employee ordinarily reaches by being promoted from Intern Pharmacist through Staff Pharmacist to Pharmacist/Manager. From the admissions in Employer's brief, and the history of the Alien's own career, it is inferred that the entry, intermediate, and managerial positions strongly appear to be a single job path that a pharmacy graduate travels by passing through rising degrees of responsibility through subordinate levels of supervisory responsibility until the worker is adjudged ready to be a Pharmacist /Manager.

On the other hand, 20 CFR § 656.24(b)(2)(ii) provides that a U. S. worker is considered qualified for the position if, based on education, training, and experience, he is able to perform the

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[11]The later decisions under **Delitizer** implemented the Board's holding and have affirmed the decisions of the Certifying Officers who reviewed all available evidence and extended their determinations beyond a mere comparison of job duties. See **Advanced Computer Concepts**, 95 INA 313(Mar. 4, 1997); **Oleen & Associates, Inc.**, 94 INA 315(Jun. 16, 1995); **Bankers Trust Company**, 93 INA 486 (Nov. 16, 1994); **Chilcote, Inc.**, (90 INA 099); **Carrillo's Mexican Restaurant**, 90 INA 098(Feb. 28, 1991).

[12] The CO is not required to accept as credible or true the written statements an employer has supplied in lieu of independent documentation, but in considering them must give employer's statements the weight they rationally deserve. The bare assertions this Employer's lawyer's statements offered were given without supporting evidence beyond the Employer's own signature. Consequently, they are visibly without supporting evidence were insufficient to carry its burden of proof. **Gencorp**, 87 INA 659 (Jan.13, 1988)(*en banc*); and see **Our Lady of Guadalupe School**, 88 INA 313 (Jun. 2, 1989); **Inter-World Immigration Service,** 88 INA 490 (Sep. 1, 1989), and Tri-P's Corp., 88 INA 686 (Feb. 17, 1989).

job in a normally accepted manner. In general, the applicant is considered qualified for the job if he meets the minimum requirements specified for the job in the labor certification application. **United Parcel Service**, 90 INA 090 (Mar. 28, 1991); **Mancillas International Ltd.**, 88 INA 321 (Feb. 7, 1990); **Microbilt Corp.**, 87 INA 635 (Jan. 12, 1988). The evidence of record established that Mr. Sayed met the minimum specified requirements and could perform the core job duties. The evidence further indicates that the primary functions of the position described in the job offer require that worker to supervise and coordinate the activities of other workers who are performing duties which are clearly similar to the duties described. Moreover, under 20 CFR § 656.20(c)(8) the Employer has failed to sustain its burden of proving that the job it offered is "clearly open" to any qualified U. S. worker because its proof showed that this is a position to which a worker must be promoted from a lesser job within its organization. **San Luis Arco**, 96 INA 167(Dec. 4, 1997)

For these reasons the panel has concluded that the rejection of Employer's application for alien labor certification by the CO is supported by the evidence of record in this case after considering the arguments in Employer's brief, the evidence of record, Employer's application for alien labor certification, the NOF, Employer's Rebuttal, and the CO's Final Determination. Consequently, the conclusion of the Certifying Officer denying alien labor certification should be affirmed.

Accordingly, the following order will enter.

ORDER

The Certifying Officer's denial of labor certification is hereby Affirmed.

For the Panel:

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FREDERICK D. NEUSNER
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400

Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.